

STATE OF MICHIGAN
COURT OF APPEALS

LINDA CEASER,

Plaintiff-Appellee,

v

SAIED GOUDA and SALAH ZOMA,

Defendant-Appellants.

UNPUBLISHED

August 21, 2014

No. 315446

Wayne Circuit Court

LC No. 11-010893-NO

Before: RIORDAN, P.J., and DONOFRIO and BOONSTRA, JJ.

PER CURIAM.

In this premises liability action, defendants appeal by leave granted¹ from the trial court's denial of their motion for summary disposition. We reverse and remand for entry of summary disposition in favor of defendants.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff's claims arise from her slip and fall on ice on the walkway of a house owned by defendants located at 20476 Kenosha in the city of Harper Woods. The incident occurred on December 19, 2010, between 6:00 and 7:00 p.m. Plaintiff claims that she went to the location to have her hair cut by defendant's tenant, Talisha Davis. Following the fall, plaintiff entered her vehicle and drove to St. John Providence Hospital, where she was treated for a compound fracture to her left tibia. This treatment included surgery and plaintiff remained in the hospital for three days.

The lease between defendants and Davis was signed on September 3, 2010, and was for a term of one year. In relevant part, the lease provided that Davis was responsible to keep and maintain the premises in good condition and repair during the term of the lease, including "shoveling the sidewalk and driveway at all times during the winters months." The lease further stated that "[s]alt should be placed on the sidewalk and In [sic] the area that is icy to prevent visitors or non-visitors from falling on the Premises."

¹ *Ceaser v Gouda*, unpublished order of the Court of Appeals, issued September 5, 2013 (Docket No. 315446). This order also stayed the proceedings below pending the outcome of this appeal.

On September 7, 2011, plaintiff filed a complaint against defendants, alleging that they had a duty (1) to exercise due care and caution for the health and well-being of persons lawfully upon the premises, (2) to maintain the premises (walkways and driveways) in a safe manner and to warn invitees of any dangerous conditions then and there existing, (3) to remove any dangerous conditions then and there existing, and (4) to obey the common laws of Michigan. The complaint further alleged that defendants breached the duties imposed by statute and common law, including implied warranty of habitability set forth in MCL 554.139.

Plaintiff testified at her deposition that she parked her vehicle in the driveway and then walked up the driveway to the side door of the house.² Plaintiff stated that there was no snow on the driveway and that the snow was piled along the sides of the driveway (indicating the snow had been shoveled onto the grass). Plaintiff heard Davis call her name from the front of the house. She then walked down the driveway and turned to walk on the brick walkway that led to the front porch. Plaintiff stepped on the walkway, slipped and fell backward. Plaintiff claimed that she did not see the ice, but she felt it with her hands while she was lying on the ground.

Plaintiff also testified that it was very cold when she left her house to drive over to see Davis. Defendants also point out that weather reports confirm that there was a 6.3-inch snowfall on December 12, 2010, and that the temperatures remained below freezing from December 12 through December 19.

On April 25, 2012, defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(10), asserting that Davis, by virtue of the language of the lease, had sole use and control of the property and expressly undertook responsibility to maintain the property by shoveling and salting the sidewalk and driveway “to prevent visitors or nonvisitors from falling” on the premises. Therefore, defendants argued that they did not have the requisite possession or control of the property to be liable for plaintiff’s premises liability claim. Defendants also argued that they did not have any notice of the icy condition on the property and that the ice was open and obvious as a matter of law where there were indicia of a potentially hazardous condition (i.e., the temperature was below freezing and there was snow on the ground). Defendants further argued that plaintiff could not maintain an action under MCL 554.139 because she was not a tenant or party to the lease agreement.

Plaintiff responded by asserting that she slipped and fell on an “unnatural” accumulation of black ice. Plaintiff claimed that the black ice was the result of water that exited from a downspout, which empties onto the driveway and runs onto the brick walkway leading to the front door. Plaintiff attached a letter from a building code inspector, Todd Arnold, who visited the premises on March 26, 2012, as well as a photograph with notes written by Arnold. In his letter, Arnold wrote the following:

The driveway is heaved up 2 inches at the left side opposite from the brick paver sidewalk to the front door. The drainage is being funneled down the driveway right onto the paver sidewalk. The paver sidewalk is lower than the driveway.

² Plaintiff testified that she had never been to the house before since Davis had only moved into the house a few months earlier.

The down spout is releasing drainage adjacent to the walkway, therefore the water will pond on the sidewalks in multiple low areas.

Arnold opined that these conditions violated section 3.02.3 and 204.7 of the International Property Maintenance Code. Plaintiff also provided the affidavit from a meteorologist, Paul Gross, who stated that the weather conditions prior to the incident were conducive to the formation of ice about seven days prior to the incident and that defendants had more than ample time to discover and ameliorate the ice hazard.

Plaintiff also argued that her “claims” sounded in an ordinary negligence, which precludes the application of the open and obvious doctrine, and that assuming her claims sound in premises liability, there are genuine issues of material fact regarding the applicability of the open and obvious doctrine and regarding whether defendants had notice of a defective condition on the property. Plaintiff also argued that defendants were under a statutory duty to maintain the rain water drainage system pursuant to MCL 125.471, which provides:

Every dwelling and all the parts thereof including plumbing, heating, ventilating, and electrical wires shall be kept in good repair by the owner. The roof shall be maintained so as not to leak and the rain water shall be drained and conveyed therefrom through proper conduits into the sewerage system in accordance with plumbing regulations so as to avoid dampness in the walls and ceilings and insanitary conditions.

Defendants replied, asserting that plaintiff’s slip-and-fall claim was a premises liability claim, and reiterating that they did not have possession and control of the premises and therefore they cannot be held liable. Defendants also responded to plaintiff’s argument relating to MCL 125.471, by citing *Buhalis v Trinity Continuing Care Services*, 296 Mich App 685; 822 NW2d 254 (2012), and to plaintiff’s argument regarding notice, by citing *Altairi v Alhaj*, 235 Mich App 626; 599 NW2d 537 (1999), claiming that this Court has refused to rely on similar affidavits from meteorologists to create an issue of fact regarding notice.

The trial court held a hearing on defendant’s motion on January 11, 2013. Following the argument by defendants’ attorney, the trial court indicated that it was denying the motion:

Well we have to deny the motion. In looking at the pictures that were attached here, in particular the downspout that was diverted, there was an obvious diversion of the downspout and water coming down through onto the slanted walk area. In light of that defective downspout, we would have a specific duty that the defendant would have toward the plaintiff.

In terms of the notice issue, again, I think we have a factual question on the constructive notice of the water and the ice. In light of the diverted downspout, a reasonable jury could find that in such a situation there would be the potential of a hazard during the winter months with a problem like this being created. Again, that would be a sufficient basis for a reasonable jury to find a constructive notice under these circumstances.

In addition, the court believes that the brief that was filed in opposition was very thorough and very good actually and we will adopt the analysis of the plaintiff's brief as to the other aspects of the case, in particular, the open and obvious pleading and position. To make a long story shorter, we believe that there are a multitude of questions of fact on this issue and if in fact there is negligence on the part of the defendant, the jury can consider these other questions in terms of comparative fault, comparative negligence on the part of the plaintiff from [sic] her failure to see a hazard if in fact the jury so finds. So for those reasons then we will deny the motion for summary disposition.

When defendant's attorney sought clarification about whether the trial court was also finding a question of fact on the open and obvious issue, the trial court sought a comment from plaintiff's counsel who stated:

MR. NAGY: Well I think my brief says it all, Your Honor. We did allege both a statutory – separate from the landlord tenant statute. The Court of Appeals did address in an unpublished opinion which I did attach to my brief as well as the downspout itself connecting it to the negligence claim. In either of those regards, whether open and obvious from this analysis.

THE COURT: I agree. I couldn't have said it any better. As I said the brief filed in opposition to same [sic] was very thorough and we will adopt it and deny the motion.

On January 23, 2013, the trial court entered an order, stating that defendants' motion for summary disposition was denied "for the reasons stated on the record" and that the "open and obvious defense is inapplicable to Plaintiff's claims, for the reasons stated on the record." On March 7, 2013, the trial court entered an order denying defendants' motion for reconsideration. This appeal followed.

II. STANDARD OF REVIEW

We review a trial court's decision on a motion for summary disposition de novo. *Moser v Detroit*, 284 Mich App 536, 538; 772 NW2d 823 (2009). Summary disposition is proper under MCR 2.116(C)(10) if "there is no genuine issue as to any material fact, and the moving party is entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). We consider the affidavits, pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmoving party. *Liparoto Constr, Inc v Gen Shale Brick, Inc*, 284 Mich App 25, 29; 772 NW2d 801 (2009). All reasonable inferences are to be drawn in favor of the nonmovant, *Dextrom v Wexford County*, 287 Mich App 406, 415; 789 NW2d 211 (2010). If it appears that the opposing party is entitled to judgment, the court may render judgment in favor of the opposing party. MCR 2.116(I)(2); *Bd of Trustees of Policemen & Firemen Retirement Sys v Detroit*, 270 Mich App 74, 77-78; 714 NW2d 658 (2006). A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds could differ. *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 425; 751 NW2d 8 (2008).

Issues of statutory construction present questions of law that this Court reviews de novo. *In re Temple Marital Trust*, 278 Mich App 122, 128; 748 NW2d 265 (2008).

III. NATURE OF PLAINTIFF'S CLAIM

Defendants first contend that the trial court erred in ruling that plaintiff's claims sounded in ordinary negligence, to which the open and obvious doctrine does not apply. Plaintiff responds that her claims sound in ordinary negligence because it is not defendants' status as a premises owner on which liability is based; rather she claims that liability exists as a result of their negligent conduct in routing the drain spout to empty onto the driveway. While it is not entirely clear that the trial court in fact ruled that plaintiff's claims sounded in ordinary negligence, we agree that plaintiff's claims are premises liability claims.

Courts are not bound by the labels that parties attach to their claims. *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998). Indeed, "[i]t is well settled that the gravamen of an action is determined by reading the complaint as a whole, and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams (On Reconsideration)*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Michigan law distinguishes between claims arising from ordinary negligence and claims premised on a condition of the land. See *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001). In the latter case, liability arises solely from the defendant's duty as an owner, possessor, or occupier of land. *Laier v Kitchen*, 266 Mich App 482, 493; 702 NW2d 199 (2005). If the plaintiff's injury arose from an allegedly dangerous condition on the land, the action sounds in premises liability rather than ordinary negligence; this is true even when the plaintiff alleges that the premises possessor created the condition giving rise to the plaintiff's injury. *James*, 464 Mich at 18-19. [*Buhalis v Trinity Continuing Care Services*, 296 Mich App 685, 689; 822 NW2d 254 (2012).]

As the plaintiff did in *Buhalis*, 296 Mich App at 689, plaintiff alleges that she was injured when she slipped on black ice and fell. Even though plaintiff theorizes that defendants created the dangerous condition by disconnecting the downspout from the underground drain, which then caused water to flow down the driveway and onto the walkway, which then turned to black ice due to the weather conditions, such a claim is still one for premises liability. See *Kachedas v Invaders Self Auto Wash, Inc*, 486 Mich 913-914; 781 NW2d 806 (2010) ("The plaintiff, who was allegedly injured by slipping on the icy surface of the defendant's premises, claimed that he was injured by a condition of the land and, as such, the claim was one for premises liability . . ."). Plaintiff was injured by a condition of the land; her claims therefore sound in premises liability. We analyze the remainder of defendant's assertions of error accordingly.³

³ We separately address plaintiff's claims that defendants violated MCL 125.471 and MCL 554.139.

IV. DEFENDANTS' POSSESSION AND CONTROL OF THE PROPERTY

Defendants next argue that they did not have possession and control of the property, and therefore, they cannot be liable for plaintiff's premises liability claims. We agree.

"Premises liability is conditioned upon the presence of both possession and control over the land." *Orel v Uni-Rak Sales Co*, 454 Mich 564, 568; 563 NW2d 241 (1997), quoting *Merritt v Nickelson*, 407 Mich 544, 552; 287 NW2d 178 (1980). In *Orel*, the Court quoted the following from *Merritt*:

Ownership alone is not dispositive. Possession and control are certainly incidents of title ownership, but these possessory rights can be 'loaned' to another, thereby conferring the duty to make the premises safe while simultaneously absolving oneself of responsibility. [Orel, 454 Mich at 564; emphasis in original.]

Further, in *Derbabian v S&C Snowplowing, Inc.*, 249 Mich App 695, 705; 644 NW2d 799 (2002), this Court elaborated that "'premises liability is conditioned upon the presence of both possession and control over the land' because the person having such possession and control is 'normally best able to prevent . . . harm to others.'" *Id.*, quoting *Merritt*, 407 Mich at 552, quoting Prosser, Torts (4th ed), § 57, p 351; see also *Bailey v Schaaf*, 494 Mich 595, 599; 835 NW2d 413 (2013) ("Our common law has long imposed the same duty of care on landlords and merchants to remedy physical defects in premises over which they exert control.")

In this case, defendants' tenant, Davis, was in possession and control of the premises. Additionally, defendants transferred responsibility for snow removal and salt application to her under the lease, which specifically charged Davis with the duty "to prevent visitors or non-visitors from falling on the Premises." Therefore, it was Davis, not defendants, who owed a duty to invitees to maintain the premises in a safe manner, at least with regard to removal of snow and ice. Accordingly, under the cited cases, plaintiff may not maintain a premises liability claim against defendants because they did not exert control over the premises, and they transferred the duty of snow and ice removal to Davis. Plaintiff's claims for premises liability fail against defendants regardless of the applicability of the open and obvious doctrine, and any constructive notice on the part of defendants; accordingly we do not address those arguments.

IV. VIOLATION OF MCL 125.471

Plaintiff maintains that defendants also violated their statutory duty to maintain the property's drainage system pursuant to MCL 125.471, which provides:

Every dwelling and all the parts thereof including plumbing, heating, ventilating, and electrical wires shall be kept in good repair by the owner. The roof shall be maintained so as not to leak and the rain water shall be drained and conveyed therefrom through proper conduits into the sewerage system in accordance with plumbing regulations so as to avoid dampness in the walls and ceilings and insanitary conditions.

The open and obvious doctrine does not operate to deny liability when the defendant has a statutory duty to maintain the premises in reasonable repair. *Benton v Dart Properties, Inc.*, 270 Mich App 437, 441; 715 NW2d 335 (2006). Thus, if MCL 125.471 imposes such a duty on

defendants, defendants would not be able to escape liability by asserting that plaintiff's injury was caused by an open and obvious hazard.

However, this Court has held that MCL 125.471 does not impose a duty on a landlord to remove snow and ice on the grounds outside a dwelling:

Although the statute imposes an obligation to maintain the roof of a dwelling and to drain rain water, it specifically provides that the duty is imposed to "avoid dampness in the walls and ceilings and insanitary conditions." *Id.* That is, it plainly does not impose a duty to remove snow and ice on the grounds outside the dwelling. And Ms. Buhalis did not otherwise allege that her injuries resulted from a failure to maintain the dwelling in good repair. See *Morningstar v Strich*, 326 Mich 541, 545; 40 NW2d 719 (1950) (holding landlord liable for injuries to tenant's child when injured by radiator that landlord had prior knowledge was defective). Accordingly, under these facts, the trial court should have dismissed Ms. Buhalis's claim to the extent that it relied on MCL 125.471. [*Buhalis*, 296 Mich App at 699.]

While plaintiff attempts to distinguish the case by noting the use of the phrase "under these facts" in *Buhalis*, the above rationale is exactly applicable to the facts of this case, wherein plaintiff alleges that she was injured by ice that formed as a result of improper drainage of water from a downspout.

Further, to the extent that plaintiff argues that defendants violated MCL 125.471 by failing to properly drain water from the roof and convey it into the sewer system, a cause of action for violation of Michigan Housing Law is available only to occupants and enforcing agencies, not third parties. See MCL 125.534. Thus, plaintiff's argument, if accepted, would not provide a direct means for her to recover damages from defendants, but would at most mean only that the open and obvious doctrine would not apply to bar her claims. See *Benton*, 270 Mich App at 441. However, as stated above, our holding is not based on the application of the open and obvious doctrine, but on defendants' lack of possession and control of the property.

We therefore hold that, in denying summary disposition to defendants, the trial court erred to the extent it relied on MCL 125.471.⁴

⁴ We note that plaintiff's complaint did not allege a violation of MCL 125.471. Instead, plaintiff argued in response to defendant's motion that defendants' alleged violation of MCL 125.471 was proof that her claims sounded in ordinary negligence, rather than premises liability. The trial court did not specifically hold that defendants had violated MCL 125.471, but did indicate that it was adopting plaintiff's brief filed in opposition to defendant's summary disposition motion. The brief contained an argument related to violation of MCL 125.471. To the extent that the trial court adopted plaintiff's argument that defendants breached MCL 125.471, we hold that it erred as a matter of law in doing so.

V. VIOLATION OF MCL 554.139

Finally, defendants argue that only a tenant may sue to enforce the implied warranties under MCL 554.139, and therefore, the trial court erred in failing to address this argument raised below in their motion for summary disposition. We agree.

MCL 554.139 provides, in relevant part:

(1) In every lease or license of residential premises, the lessor or licensor covenants:

(a) That the premises and all common areas are fit for the use intended by the parties.

(b) To keep the premises in reasonable repair during the term of the lease or license, and to comply with the applicable health and safety laws of the state and of the local unit of government where the premises are located, except when the disrepair or violation of the applicable health or safety laws has been caused by the tenants [sic] wilful[I] or irresponsible conduct or lack of conduct.

In *Mullen v Zervas*, 480 Mich 989-990; 742 NW2d 114 (2007), our Supreme Court explained that the terms of the statute indicate that the duties prescribed by MCL 554.139(1) exist between the contracting parties and that the defendant landlord did not have a duty under the statute to a social guest of the tenant. See also *Buhalis*, 296 Mich App at 699 (holding that MCL 554.139 did not apply to the plaintiff's claim premised on the statute against the nursing home.)

The trial court erred in denying defendant's motion for summary disposition and failing to dismiss plaintiff's premises liability and statutory claims. We therefore reverse the order of the trial court and remand for entry of summary disposition for defendants. As the prevailing party, defendants may tax costs related to their appeal. MCR 7.219(A). We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra